RECORD AND BRIEFS

No. 16-980

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In The
Supreme Court of the United States

JON HUSTED, OHIO SECRETARY OF STATE,

Petitioner,

v.

A. PHILIP RANDOLPH INSTITUTE, ET AL.,

Respondents.

On Petition For A Writ Of Certiorari To The United States Court Of Appeals For The Sixth Circuit

BRIEF OF *AMICUS CURIAE* LANDMARK LEGAL FOUNDATION IN SUPPORT OF PETITIONER

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STATEMENT OF INTEREST OF LANDMARK LEGAL FOUNDATION[1]

Landmark Legal Foundation ("Landmark") is a national public interest law firm committed to preserving the principles of limited government, separation of powers, federalism, advancing an originalist approach to the Constitution and defending individual rights and responsibilities. Specializing in constitutional history and litigation, Landmark submits this brief in support of Petitioner State of Ohio. For reasons stated herein, Landmark respectfully requests the Court grant certiorari.

INTRODUCTION AND SUMMARY OF ARGUMENT

Ensuring the integrity of the vote is a fundamental obligation of our government. It is crucial that citizens have confidence in the electoral process. *Purcell v. Gonzalez*, 549 U.S. 1, 4 (2006). Voter fraud "breeds distrust of our government" and "drives honest citizens out of the democratic process." Id. Since the advent of our republic, the individual states have played an

[1] The parties were notified ten days prior to the due date of this brief of the intention to file. The parties have consented to the filing of this brief. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief. Nor person other than Amicus Curiae, its members, or its counsel made a monetary contribution to its preparation or submission.

integral role in ensuring open and fair elections. Article I, Section 4 vests the states with authority to set the "Times, Places and Manner of holding Elections for Senators and Representatives. . . ." U.S. Const. Art. I, § 4. As Madison stated at Virginia's ratifying convention:

> It was found impossible to fix the time, place, and manner, of the election of representatives, in the Constitution. It was found necessary to leave the regulation of these, in the first place, to the state governments, as being best acquainted with the situation of the people, subject to the control of the general government, in order to enable it to produce uniformity, and prevent its own dissolution.

3 Debates on the Adoption of the Federal Constitution 367 (J. Elliot ed. 1876) (James Madison, Virginia).

Local and state control of the election process preserves liberty. "The dispersal of responsibility for election administration has made it impossible for a single centrally controlled authority to dictate how elections will be run, and thereby be able to control the outcome." H.R. Rep. No. 107-329, pt. 1, at 32 (2001). This dispersal of responsibility creates on the states and localities an obligation to maintain accurate and up-to-date voter rolls.

The state of Ohio ensures its voter rolls are accurate and up-to-date by a process enacted in 1994. 145 Ohio Laws 2516, 2521 (1994). Ohio's registration list maintenance process is consistent with the limitations

established by Congress. The Sixth Circuit, however, incorrectly ruled the National Voter Registration Act of 1993 ("NVRA") and the Help America Vote Act of 2002 ("HAVA") do not permit Ohio's supplemental list maintenance program. Pet. App. 1a-37a. In short, the lower court incorrectly concluded that the NVRA's general prohibition of removing individuals from voter registration lists for failure to vote invalidated the state's supplemental list maintenance program. Id. Ohio does not remove individuals from voting lists for failing to vote, but rather for not responding to inquiries prompted by a carefully constructed registration confirmation plan. The Sixth Circuit misapprehends Ohio's program and the lower court's ruling must be reversed.

Granting *certiorari* presents the Court with the opportunity to address an important issue of both constitutional and statutory interpretation pertaining to the NVRA and HAVA. Is a voter list maintenance program that uses a voter's inactivity as a justification to deliver a confirmation notice to that voter valid under the NVRA and HAVA?

The legislative history of the NVRA and HAVA indicates that Congress both understood and reaffirmed the power of states to ensure the integrity of their voter rolls. Congress balanced the need to increase voter turnout with the need to preserve the integrity of the election process by authorizing states to conduct periodic voter list maintenance activities. In enacting the NVRA, Congress established a system whereby states

could develop and implement a system to ensure ineligible names are removed from the voter rolls. HAVA further clarified the process by which states could operate these systems.

Ohio's supplemental program comports with both statutes.

ARGUMENT

I. Congress designed the NVRA and HAVA to balance the interests between ballot integrity and ballot access.

The NVRA and HAVA work in concert to ensure elections are fair and accurate. The NVRA establishes procedures to increase "the number of eligible citizens who register to vote in elections for Federal office; . . . [and] to ensure that accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). HAVA, enacted in response to voting issues in the 2000 presidential election, generally imposes minimal election standards on states and provides federal assistance to states to ensure election officials "count every citizen's vote, count it accurately and be able to report it quickly." *Mark up of H.R. 3295, The Help America Vote Act of 2001 Before the H. Comm. on House Administration*, 107th Cong. 5-6 (2001) (statement of Steny Hoyer, Ranking Minority Member.)

Various proposals designed to establish a national voter registration system followed the enactment of

the Voting Rights Act of 1965. Royce Crocker, Cong. Research Serv., R40609, *The National Voter Registration Act of 1993: History, Implementation, and Effects* (2013). These included efforts during the 1970s and 1980s to establish a national "postcard" registration system and election-day registration. Although the Senate and House held several hearings on the issue, no bills reached the floor of either body. Id. In the 1988 presidential election, voter turnout reached its lowest point in 40 years with just slightly over 50% of the voting-age population casting votes. Id. In response to low turnout and "as a continuation of the long-standing efforts by proponents of registration reform, at the beginning of the 101st Congress, several bills were introduced to reform voter registration procedures." Id. After several efforts failed, the 103rd Congress passed and President Clinton signed into law the NVRA. Id.

A. The NVRA compels states to conduct a program to maintain accurate voter lists.

The NVRA obligates states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists" of registered voters. 52 U.S.C. § 20507(a)(4). HAVA obligates states to "ensure that voter registration records in the State are accurate and are updated regularly. . . ." 52 U.S.C. § 21083(a)(4). The NVRA and HAVA require states to remove individuals who have become ineligible because of change of residence. The language of subsection 52 U.S.C. § 20507(b)(2) of the NVRA was

appended by HAVA to clarify Congress's intention that an individual shall not be removed from the voter rolls solely by reason of failure to vote. *See* 52 U.S.C. § 21083(a)(4)(A).

The NVRA governs how applicable states conduct voter registration and voter list maintenance for federal elections. Among other things, Congress enacted the NVRA to "increase the number of eligible citizens who register to vote" while protecting "the integrity of the electoral process" by ensuring that "accurate and current voter registration rolls are maintained." 52 U.S.C. § 20501(b). This focus on ballot integrity was key to passage.

Section 8 of the NVRA applies to state voter list maintenance procedures for federal elections. 52 U.S.C. § 20507. It obligates states to "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of . . . a change in residence of the registrant, in accordance with subsections (b), (c), and (d)." 52 U.S.C. § 20507(a)(4)(B). A state's program to ensure the maintenance of accurate and current voter registration rolls "shall be uniform" and "nondiscriminatory." 52 U.S.C. § 20507(b)(1). It shall also, "not result in the removal of the name of any person from the official list of voters registered to vote in an election for Federal office by reason of the person's failure to vote. . . ." 52 U.S.C. § 20507(b)(2).

Congress recognized the "legitimate administrative concerns of election officials" when crafting the

NVRA. S. Rep. No. 103-6 at 3 (1993). These concerns included, "the detection and prevention of fraud, the maintenance of accurate and up-to-date voter rolls, and the removal of the names of ineligible persons from the rolls." Id. The "mobility of our population" makes these tasks "particularly difficult" for state election officials. Id.

The NVRA was, therefore, the culmination of the need to balance the "legitimate administrative concerns" of election officials with the need to enhance "participation of eligible citizens as voters in elections for Federal office." Id. at 1. Congress intended that the NVRA "ensure that once a citizen is registered to vote, he or she should remain on the voting rolls." Congress, however, was also aware that opening the registration process "must be balanced with the need to maintain the integrity of the election process by updating the voting rolls on a continual basis." Id. at 17-18. The NVRA thus requires states to maintain the integrity of the voter rolls by making "a reasonable effort to remove the names of ineligible voters from the official lists by reason of death or a change in residence." Id. at 18. States are authorized to maintain their voter roll integrity by conducting a maintenance program in conformance with the provisions described in Section 8.

Congress also noted that the NVRA did not mandate any specific time periods for utilizing list maintenance procedures. Id. at 20. The provisions pertaining to voter removal were intended to become irrelevant as technology improved and registration roll maintenance became more streamlined:

> While these provisions have been included to insure that voting rolls will be free from "deadwood," there will be less need for these mailing because the programs of voter registration include provisions for automatic updating of addresses. Thus, the process of updating registration rolls is an ongoing and continuous process.

Id.

Despite Congress's best intentions, jurisdictions failed to ensure their voting rolls would be free from "deadwood." The removal process specified in Section 8 failed to effectively ensure accurate voter lists. In 2001-2002, for example, a number of states reported that they faced challenges in maintaining accurate lists. Federal Election Commission, *The Impact of The National Voter Registration Act of 1993 on the Administration of Elections for Federal Office 2001-2002*, 2 (2003). This and a number of other factors spurred Congress to act.

B. HAVA provided clarification to states that operate voter list maintenance programs.

Issues surrounding the 2000 presidential election and the recount sparked legislative action. Recounts and voting registration issues in 2000 had shaken the public's confidence in the election system:

> Uncertainty reigned in our democracy. Public confidence in our election system was shaken.

> The United States of America, the most technologically advanced Nation in the world, had not fulfilled its most basic election duty, the duty to count every citizen's vote, count it accurately and be able to report it quickly.

Mark up of H.R. 3295, The Help America Vote Act of 2001, 107th Cong. 5-6 (2001) (statement of Rep. Bob Ney, Chair).

It was estimated that during the 2000 election 2 million votes went uncounted with another 3 to 4 million votes that were not cast because of registration problems. Id. at 6.

To address these problems, Congress heard extensive testimony from election officials and election technology experts. Legislators in Congress proposed as many as 50 bills involving campaign finance reform or election reform. *Federal Election Reform Before the H. Comm. on House Admin.*, 107th Cong. 3 (2001) (statement of Rep. Steny H. Hoyer, Ranking Minority Member). Congress addressed these issues by enacting HAVA.

Congress designed HAVA to address the "disconnects" that arose following enactment of the NVRA between voter registration systems such as DMV or social services agencies and election officials. Id. at 8 (statement of Doug Lewis, Director, The Election Center). These included voter files that had become "inflated" in states such as Kansas due to mandatory compliance with NVRA. Id. at 14 (statement of Connie Schmidt, Election Commissioner, Johnson County

Kansas). NVRA implementation also had resulted in the problem of duplicate registration, attributable to a massive influx of registration data and a failure of individuals to notify election officials those individuals had moved. *Voting Technology Hearing Before the H. Comm. on House Admin.*, 107th Cong. 16 (2001).

The fraudulent registration process, where identical voters appeared on multiple voting lists because those individuals are not removed, concerned Congress:

> The other problem is, of course, that people are not purged from the list when they move from one jurisdiction and register in another jurisdiction. They can easily vote in both places and it would not be detected under any system we have now. So I just wanted to lay that issue out clearly.

Id. at 17-18 (2001) (statement of Rep. Vernon J. Ehlers).

Congress further identified the voter registration process as particularly vulnerable to fraud:

> I think the greatest opportunity for fraud, is in voter registration; and we need to pay much more attention to voter fraud there and ensuring that voting lists are good, that we purge them regularly; that when someone moves, they can't keep registration at their former address and so forth.

Hearing on Technology and the Voting Process Before the H. Comm. on House Admin., 107th Cong. 39 (2001) (statement of Rep. Vernon J. Ehlers).

Expanding on the issue of the effect of a mobile population on the accuracy of voter rolls, the final report from the House Committee on Administration found:

> People are mobile, but more than three-quarters of all residential moves are in-state. An effective statewide database can therefore be quite useful, including its capacity to address such common issues as the registration of in-state college students and people with second homes within a state. But perhaps the most important beneficiaries of statewide registration systems will be members of lower-income groups, who are more likely to move than higher-income groups within the same state.

H.R. Rep. No. 107-329, pt. 1, at 36 (2001).

After considering input from experts in voting technology and state election officials, Congress agreed to impose seven minimum standards to protect the integrity of the voting process while respecting the important role states and localities play. HAVA imposed upon the states the implementation of a statewide registration system that would be networked to every jurisdiction within the state. HAVA also obligates states to implement a "system of file maintenance which ensures that the voting rolls are accurate and updated regularly." *Mark up of H.R. 3295, The Help America*

Vote Act of 2001, 107th Cong. 3 (2001) (statement of Rep. Bob Ney, Chair).

Congress designed HAVA, in part, to ensure voting rolls are accurate and updated on a regular basis by clarifying the NVRA's procedures for removal of ineligible registrants. Id. at 4. Removal from the voter rolls would only occur provided a registrant did not vote for at least two consecutive federal elections and failed to respond to a notice. When commenting at the markup hearing for the HAVA, the following exchange occurred:

> [Congressman Doolittle]: I understand everything until we get to the phrase, which says, "except that no registrant may be removed solely by reason of the failure to vote." And that seems to me to kind of muddy the water to what it said prior to that. So could I just ask what the effect of that is?
>
> The Chairman: Counsel is telling me you can't be removed simply because you haven't voted. *You have to have not voted and not responded to a notice.*

Id. at 12 (emphasis added).

Ranking minority member Representative Steny Hoyer further expanded on the issue raised by Congressman Doolittle:

> Mr. Hoyer: I think I understand what you are saying. If you read this two together, they both mean that you can't remove somebody for not voting solely. That is what the –

> Mr. Fattah: The gentleman suggested somebody should be removed from the rolls?
>
> Mr. Hoyer: That is what the National Voter Registration Act says, and therefore from your perspective if that causes you some concern, it doesn't add anything or detract anything, but from our standpoint it makes it clear that is the intent. That is what the current law is and we just wanted to indicate so we don't create a controversy outside this bill that frankly we don't need. We have got enough controversy as it is.

Id.

This sentiment is reflected in the final report from the House Committee on Administration:

> (2) The State election system includes provisions to ensure that voter registration records in the State are accurate and are updated regularly, including the following:
>
> > (A) A system of file maintenance which removes registrants who are ineligible to vote from the official list of eligible voters. Under such system, consistent with the National Voter Registration Act of 1993, registrants who have not voted in 2 or more consecutive general elections for federal office and who have not responded to a notice shall be removed from the official list of eligible voters, except that no

> registrant may be removed solely by reason of a failure to vote.

H.R. Rep. No. 107-329, pt. 1, at 36-37 (2001).

HAVA clarified the language from NVRA section 20507(b)(2) following the general rule prohibiting removal from the voter rolls for failure to vote:

> . . . except that nothing in this paragraph may be construed to prohibit a State from using the procedures described in subsections (c) and (d) to remove an individual from the official list of eligible voters if the individual –
>
> (A) has not either notified the applicable registrar (in person or in writing) or responded during the period described in subparagraph (B) to the notice sent by the applicable registrar; and then
>
> (B) has not voted or appeared to vote in 2 or more consecutive general elections for Federal office.

52 U.S.C. § 20507(b)(2).

The amendment to the NVRA clarified any confusion regarding voter removal procedures. In the original HAVA legislation, the amendment is entitled "Clarification of ability of election officials to remove registrants from official list of voters on grounds of change of residence." H.R. Rep. No. 107-730, pt. 1, at 81 (2001). Statements from legislators during hearings and markups show that states could only remove an individual from the voter rolls if the individual did not

vote *and* did not respond to a notice. Under HAVA, states are obligated to remove "registrants who have not responded to a notice and who have not voted in 2 consecutive general elections." 52 U.S.C. § 21083(a)(4)(A).

Congress thus provided a roadmap for the states. Consistent with the NVRA and HAVA, an individual cannot be removed from the voter rolls solely for not voting. States can remove individuals if the individual has not voted and failed to respond to a notice.

II. Ohio's supplemental list maintenance process conforms to the text, history, and purpose of the NVRA and HAVA.

Ohio uses the supplemental process to identify electors "whose lack of activity indicates they may have moved, even though their names did not appear" in the change-of-address database. Cert. Pet. p. 10. Those individuals who have not voted for two years are sent confirmation notices. Id. Should the voter return the notice via prepaid mail or confirmation via the internet, the local board of election updates the voter's information. Id. Should the voter ignore the notice and fail to vote or update the voter's registration over the next four years, the board will cancel the registration. Id.

The supplemental process only removes individuals who *both* fail to respond to a notice *and* fail to either vote or update their registration for six years. The Sixth Circuit reversed the lower court's dismissal of a

challenge to Ohio's supplemental process. The Sixth Circuit erred when it concluded that the HAVA did not permit Ohio to use nonvoting as a "trigger." Pet. App. 15a-20a. Nothing in either the text or the legislative history of the HAVA suggests that Congress intended to exclude the type of supplemental program employed by Ohio. In fact, the extensive discussions regarding restoring and preserving the integrity of ballot system support the supplemental process.

Ohio has an obligation to ensure that its voter rolls are accurate. "The separate States have a continuing, essential interest in the integrity and accuracy used to select both state and federal officials." *Arizona v. Inter Tribal Council of Ariz., Inc.*, 133 S.Ct. 2652, 2261 (2015) (Kennedy, J., concurring). When individuals move from a jurisdiction and fail to inform their respective election officials, those officials can take reasonable steps to determine whether the individual should continue to be on the voter rolls. The debates surrounding enactment of HAVA are clear: a voter cannot be removed from the voter rolls solely from failing to vote. An individual, however, must be removed from the voter rolls if that individual has failed to vote in two consecutive federal elections and has failed to respond to a notice.

Ohio's supplemental program is consistent with the text, purpose and history of the NVRA and HAVA. Certiorari will present the Court with the opportunity to reverse the Sixth Circuit's error.

CONCLUSION

For the reasons stated herein Landmark respectfully urges the Court to grant Petitioner's Writ of Certiorari.

Respectfully submitted,

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